



U.S. Department of Justice
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044-7611

Thomas A. Mariani, Jr.
Assistant Chief

tom.mariani@usdoj.gov
Telephone (202) 514-4620
Facsimile (202) 616-6584

(Communication in Furtherance of Settlement Talks)

September 11, 2008
(By e-mail & U.S. Mail)

James C. Morriss III (James.Morriss@tklaw.com)
Elizabeth Webb (Elizabeth.Webb@tklaw.com)
Thompson & Knight LLP
1900 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701-4081
(Counsel for Dow)

F. William Mahley (BillMahley@Strasburger.com)
Strasberger Attorneys At law
1401 McKinney Street, Suite 2200
Houston, Texas 77010-4035
(Counsel for Sequa / Chromalloy)

Allen Daniels (allenbdaniels@gmail.com)
Attorney & Counselor at Law
1177 West Loop South, Suite 1725
Houston, Texas 77027
(Counsel for LDL Coastal Limited)

RE:

Gulfco Marine Maintenance Superfund Site, Freeport, Texas --
Follow up Conference call with UAO Respondents, Rejection of their Settlement Approach, and
Suggestion of Some Alternatives

Dear Counsel:

Thank you for taking time on August 15 to discuss both the proposed order for removal of tanks at the Site and your clients' overall proposal concerning disposition of the Site. As an

NPL Site for which EPA has issued your clients a Unilateral Order for Remedial Investigation and Feasibility Study (RI/FS Order)¹, the federal government remains concerned about moving forward with all clean up warranted for the Site.

Among other things, your clients propose speeding up significantly (perhaps by more than one year) the work called for by the RI/FS Order and also removing certain tanks now located on the Site. In return, and before EPA issues any Record of Decision for the Site, your clients seek, among other things: 1) An understanding from EPA that it will – as soon as appropriate -- look to eliminate from the definition of this NPL site those portions of the Site which include slips and berthing piers, and 2) entry of a Consent Decree that would supersede the extant RI/FS Order, control the balance of the RI/FS work, and control the performance of further response action (if any).

Your clients believe that those portions of the Site equipped with berths and slips might be put to use right now and that – with the exception of one issue involving ground water – essentially all that remains of RI/FS work is to write up the results of the field work.

To the extent the federal government's concerns about ground water contamination at the Site make a Consent Decree impracticable at this time, you also suggest a variation on your main proposal, under which you would reach an understanding with the federal government that EPA would look to delist, as soon as appropriate, that portion of the Site containing those slips and berths; in return, your clients would remove certain tanks from the Site.

Use of the Site is an important, and appropriate goal, to be sought in harmony with steps needed to secure whatever clean up is warranted for the Site. We conclude that your proposal does not appropriately balance those important concerns and may well understate the possibilities of returning part of the Site to use while necessary investigatory and analytic work are completed (along with further clean up work, if warranted).

On use of portions of the Site (such as the slips and berths), please consider the information and guidance EPA provides on-line for those considering use or purchase of Superfund sites.² Depending upon your re-use or redevelopment interests, some of this information may be of interest.

¹ Amended Unilateral Administrative Order for Remedial Investigation / Feasibility Study at Gulfco Marine Maintenance Superfund Site, Freeport, Texas (U.S. EPA Region 6 CERCLA Docket No. 06-05-05A)

² See <http://www.epa.gov/compliance/resources/publications/cleanup/superfund/top-10-ques.pdf>, <http://www.epa.gov/compliance/resources/publications/cleanup/brownfields/handbook/index.html>, and <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/rfr-deter-cmpt.pdf> (all sites last visited 08/26/2008).

**Letter to Counsel for some of Respondents to Gulfco Marine RI/FS Unilateral Administrative Order, CERCLA Docket No. 06-05-05A; from T. Mariani; Sept. 11, 2008
Communication in furtherance of settlement talks; Rule 408, Fed. R. Civ. P.**

As for the balance of your offer, we reject it because we disagree with you on a number of its premises. Some of our disagreements with you are summarized below.

If entry of a consent decree prior to issuance of a ROD would be legal at this time³, that approach would nonetheless be imprudent. Work remains to be done under the RI/FS Order, work that will help EPA understand the scope and nature of problems at the Site and whether any further response is warranted. Even if it were true that the only remaining RI/FS activity is to "write up" the results of the work already done, that activity is crucial to the process. The "write up" includes analysis essential to proper investigation and study of remedial options. The possible ground water issue here likely makes this analytic work especially important, given the challenges sometimes seen in properly characterizing and addressing such contamination. The risk assessment also is part of what needs to be written up here, and that analysis may give EPA important insight into whether further response is warranted.

Similarly, the "write up" required by the RI/FS Order may also reveal other information important to Agency decision making. While you maintain that commercial use is the only use for the Site, the Agency normally would also seek the counsel of local groups and governments in assessing the likely uses for the Site and would consider those views in deciding whether and to what extent further response is warranted.

It may well be that your clients are correctly predicting what the Agency's decisions will be for the Site, both as to further response and as to anticipated land use, but your clients' statements are predictions and are made in advance of the process EPA follows in hopes of making good decisions under applicable law and guidance.

Here are some alternatives. Please:

- a. Consider information on re-use of Superfund sites, including the materials found at the locations noted in footnote 2; EPA would be happy to meet with the current landowner and discuss re-use of the Site during and after completion of the cleanup of the Site;
- b. Consider speeding up the RI/FS work as much as you can. Your proposal suggests that more rapid progress on the RI/FS work is within your power. That result is not just in EPA's interest but also will contribute mightily to your clients' goals by securing sooner a greater degree of confidence about the ultimate status of the Site. That knowledge may well open up more options for the Site, especially if your clients believe they need more

³ A consent decree that would direct the final clean up of the Site before EPA decides what if any clean up would be warranted might amount to an inappropriate affirmative injunction given its inherent lack of specificity. Similarly, one might also question whether such a decree meets the typical tests for entry of consent decree (fair, reasonable, in furtherance of the goals of the statute, etc.) if the decree is entered before the final clean up decision has been made.

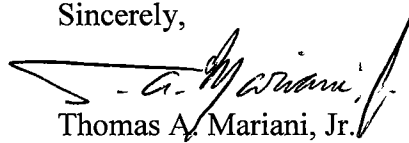
**Letter to Counsel for some of Respondents to Gulfco Marine RI/FS Unilateral Administrative Order, CERCLA Docket No. 06-05-05A; from T. Mariani; Sept. 11, 2008
Communication in furtherance of settlement talks; Rule 408, Fed. R. Civ. P.**

confidence about what kind of Site clean up will be necessary before use of the Site is economically viable; and

- c. Pay the federal government the response costs already incurred at the Site, which are at least \$874,779.88 as of July 31, 2008 (and which are growing in principal and on account of interest).

Thank you again for taking the time to talk with us on August 15. We are sorry to conclude that so much of your proposal should be rejected but hope that some of the alternatives we suggest will meet some of your goals and also foster clean up and cost recovery for the Site.

Sincerely,

A handwritten signature in dark ink, appearing to read "T. Mariani, Jr.", is written over the printed name.

Thomas A. Mariani, Jr.

Cc: B. Nann, A. Legare, G. Miller

**Letter to Counsel for some of Respondents to Gulfco Marine RI/FS Unilateral
Administrative Order, CERCLA Docket No. 06-05-05A; from T. Mariani; Sept. 11, 2008
Communication in furtherance of settlement talks; Rule 408, Fed. R. Civ. P.**